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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RUSSELL EUGENE DUNBAR, Defendant and Appellant.	G052456 (Super. Ct. No. 11CF2660) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Erica Gambale for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, Sharon L. Rhodes and Adrianne S. Denault, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Russell Eugene Dunbar appeals from his criminal conviction on 48 counts of embezzlement, forgery, and falsifying records. The prosecution presented evidence that Dunbar had, over a period of several years, diverted more than $5 million from his employer, Fields Piano, Inc., into his own bank account. The diversion was discovered several years after Dunbar had left his job at Fields Piano.

Dunbar challenges his conviction and sentencing on several grounds. He first claims that he received ineffective assistance of counsel because his lawyer did not request a jury instruction on the claim of right defense. He also contends his prior felony conviction for insurance fraud was improperly allowed as impeachment after he chose to take the stand. Finally, he asserts that he should have received only one sentence for all the embezzlement counts and that the court abused its discretion by imposing a restitution fine of $10,000 without inquiring about his ability to pay.

We affirm both the judgment and the sentencing. Dunbar was not eligible for a claim of right jury instruction, and his counsel was not ineffective for failing to request it. His defense that he thought he had a right to keep the money was adequately covered by the jury instructions. Under the circumstances presented at trial, we cannot say the court abused its discretion by allowing impeachment testimony about his prior conviction. As for sentencing, substantial evidence in the record supports the jury's implied finding that the embezzlement was not "motivated by one intention, one general impulse, and one plan." And it was Dunbar's burden to present evidence of his inability to pay, a burden he did not begin to carry.

FACTS

Fields Piano is a family-owned and -operated business that sells, rents, and restores pianos. The Goldman family has owned Fields Piano since before 1950; it is currently managed by three Goldman brothers, Jerry, Gary, and Irwin.

Dunbar began working for Fields Piano as its controller in late 2001, after the company's previous controller and its office manager abruptly quit. Jerry Goldman recommended Dunbar for the position based on a close personal relationship between the two men. Gary Goldman also knew Dunbar, although he was not as close to him as Jerry was. Both thought Dunbar would be a good fit for their company.

Dunbar apparently began diverting Field Piano's money in 2001, soon after he began working there, but because of the lapse of time before he was discovered, bank records of his activities were incomplete. More records became available from mid-2003.[1]

About two years after he began working at Fields Piano, Dunbar took out a business license stating that he was doing business as Fields Piano Company.[2] With the license in hand, he set up a bank account at California National Bank in the name of Fields Piano.[3] A month later, he abandoned the business license.

Dunbar used the following method to divert money. He was largely responsible for making Field Piano's deposits at its bank, Farmers & Merchants Bank, and typically several checks would be grouped together for deposit. When Dunbar spied a suitable group of checks, he would deposit one or more of them in the unauthorized account at California National or in another of his many bank accounts. He then wrote a check or checks on these accounts that he deposited in the real Fields Piano account at Farmers & Merchants. But the check he wrote was for a much smaller amount than the amount of the Fields Piano check or checks deposited at California National. For example, if one of a group of checks payable to Fields Piano was for $1,000, Dunbar would deposit that check in his account at California National, then write a California

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[1] The banks involved did not keep records past seven years. Fields Piano did not begin its investigation until early 2010.

[2] The business license, recorded on October 20, 2003, listed Fields Company and Fields Merchandising Company as additional fictitious business names.

[3] A bank representative testified that he would not have been allowed to open an account in the name of Fields Piano Company without a document of this kind.

National check for $100, which he would deposit along with the others at Farmers & Merchants. He then altered the deposit receipt from Farmers & Merchants to reflect the deposit of a $1,000 check, which receipt he would put in the company's files. As far as Fields Piano could tell, it had been fully paid. In this way, Dunbar was able to embezzle over $5 million in the course of two years. Dunbar also embezzled cash, but in a somewhat different way.

No one at Fields Piano suspected a thing, and Dunbar left his employment on good terms in late 2005 to set up his own business, Sun Valley Mortgage. In fact, Jerry and Gary Goldman lent Dunbar substantial amounts during his tenure at Fields Piano and afterwards to help him finance first a condominium purchase and then the purchase of a house. Dunbar paid these loans back when each piece of property was sold.

In January 2010, Dunbar sent Jerry Goldman a disturbing letter boasting of his past successes in ruining people he believed had crossed him and threatening to do the same to the Goldmans if they did not pay him nearly $400,000.[4] Dunbar claimed the brothers had agreed to a "cash-for-mortgage" arrangement whereby he would deposit money in the Fields Piano account, and they would reduce the mortgage they held on his house. Both Gary and Jerry Goldman were mystified by Dunbar's claims and by the signed agreement he later sent them and the copies of checks he claimed to have deposited in the Fields Piano account pursuant to this agreement. Both brothers denied ever having entered into such an agreement, and they testified at trial that the signatures on the document Dunbar sent to them were forged.

The forged signatures inspired an investigation. Jerry Goldman asked the current controller, Jannina Gascon, to investigate the checks Dunbar claimed to have deposited in the Fields Piano account. That is when the deception unraveled. Gascon began to pull old deposit receipts and bank records and to realize something was wrong.

[4] He also claimed to have embarrassing pictures of the Goldmans, which he threatened to expose if the Goldmans did not comply.

Eventually she identified 445 occasions when Dunbar had deposited Fields Piano checks into his own account and then wrote smaller checks and faked deposit receipts to cover up his tracks or simply taken cash. The amount diverted to Dunbar was $6.3 million.

The Goldmans contacted the Santa Ana Police Department in April 2010, and a detective investigated the matter. The detective uncovered 33 additional deposits totaling more than $500,000 in diverted funds.

Dunbar was arrested and eventually charged with 49 counts of grand theft embezzlement (Pen. Code, § 487, subd.(a)), forgery (Pen. Code, § 470, subd. (d)), and falsifying records. (Pen. Code, § 471[5].) The amended information included enhancements for aggravated white-collar crime (§ 186.11, subd. (a)(1) & (2)) and for property damage. (§ 12022.6, subd. (a)(4).)

The matter was tried to a jury over 12 days in September and October 2014. At trial, the prosecution's forensic accountant identified 322 transactions in which Dunbar diverted money from Fields Piano and a total amount of $5.6 million embezzled during 2004 and 2005.[6] Dunbar testified in his own defense, as did two character witnesses.

The jury hung on the first count, for an embezzlement alleged to have taken place in January 2003, and convicted Dunbar on the other 48 counts, for embezzlement, forgery, and falsifying records. The jury found the two enhancements true. Dunbar was sentenced to 12 years on the embezzlement convictions plus 6 years for the

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[5] All further statutory references are to the Penal Code unless otherwise indicated.

The amended information singled out 16 specific transactions and charged theft, forgery, and falsifying records for each one. Count 49 was a catch-all embezzlement count covering the period between January 1, 2003, and November 8, 2005.

Dunbar's activities were the subject of a prior opinion of this court, *People v. Dunbar* (2012) 209 Cal.App.4th 114, in which we reversed the trial court's dismissal of the falsifying records charges under section 471. Dunbar argued that the code section applied only to public records. (*Id.* at p. 117.) We held it applied to any records, not just public ones. (*Id.* at p. 118.)

[6] The amount embezzled was significantly higher, but the prosecution's forensic accountancy list of 322 transaction included only checks (no cash), and only from the years 2004 and 2005, because the records subpoenaed from the banks did not go back any further. Although the accountant found evidence of probable embezzlement in 2003, he did not include these transactions in his list.

enhancements, for a total of 18 years. Sentences for the forgery and falsifying records convictions were stayed pursuant to section 654. The court also imposed a restitution fine of $10,000.

DISCUSSION

Dunbar has identified four issues on appeal. First, he asserts he received ineffective assistance of counsel because his lawyer did not request a jury instruction on claim of right. Second, he claims the court abused its discretion by allowing testimony regarding his prior conviction for insurance fraud. Next, he protests individual sentences for separate counts of embezzlement, stating that his embezzlement was one continuous act, warranting only one sentence. Finally he disputes the court's imposition of the maximum restitution amount, $10,000, under section 1202.4.

I. Claim of Right Jury Instruction[7]

A claim of right defense negates the intent requirement for theft.[8] The court has no sua sponte obligation to give this instruction, and defense counsel must request it and be refused in order to constitute error. (See *People v. Lawson* (2013) 215

[7] The CALCRIM jury instruction for claim of right is as follows:
"1863 Defense to Theft or Robbery: Claim of Right (Pen. Code, § 511)
"If the defendant obtained property under a claim of right, (he/she) did not have the intent required for the crime of (theft/ [or] robbery). [¶] The defendant obtained property under a claim of right if (he/she) believed in good faith that (he/she) had a right to the specific property or a specific amount of money, and (he/she) openly took it. [¶] In deciding whether the defendant believed that (he/she) had a right to the property and whether (he/she) held that belief in good faith, consider all the facts known to (him/her) at the time (he/she) obtained the property, along with all the other evidence in the case. The defendant may hold a belief in good faith even if the belief is mistaken or unreasonable. But if the defendant was aware of facts that made that belief completely unreasonable, you may conclude that the belief was not held in good faith. [¶] [The claim-of-right defense does not apply if the defendant attempted to conceal the taking at the time it occurred or after the taking was discovered.] [¶] [The claim-of-right defense does not apply to offset or pay claims against the property owner of an undetermined or disputed amount.] [¶] [The claim-of-right defense does not apply if the claim arose from an activity commonly known to be illegal or known by the defendant to be illegal.] [¶] If you have a reasonable doubt about whether the defendant had the intent required for (theft/ [or] robbery), you must find (him/her) not guilty of _____ <insert specific theft crime>."

[8] Section 511 provides, "Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable. But this provision does not excuse the unlawful retention of the property of another to offset or pay demands held against him."

Cal.App.4th 108, 119.) Dunbar's counsel did not request this instruction. He therefore claims his counsel was ineffective.

A criminal defendant is constitutionally "entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." (*Strickland v. Washington* (1984) 466 U.S. 668, 685.) It is not enough that the attorney be present; his or her assistance must also be "'adequate.'" (*Id.* at p. 686, quoting *Cuyler v. Sullivan* (1980) 446 U.S. 335, 344.) "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland v. Washington, supra,* 466 U.S. at p. 686.)

"[S]crutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" (*Strickland v. Washington, supra*, 466 U.S. at p. 689; see *People v. Ledesma* (1987) 43 Cal.3d 171, 216.) On direct appeal, when no explanation for counsel's conduct can be found in the record, "we must reject the claim [of ineffective assistance of counsel] unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212; see *People v. Mai* (2013) 57 Cal.4th 986, 1009.)

Counsel in this case was not asked for an explanation for failing to request a jury instruction on claim of right, and there is a satisfactory explanation for not requesting it. Dunbar did not qualify for it. A claim of right instruction requires open taking of the property and no effort to conceal the taking at the time. (See § 511 [property must be "appropriated openly and avowedly"].)

Dunbar argues that he testified the Goldmans gave him permission to deposit checks in his California National account, and this testimony entitled him to a claim of right jury instruction, because there was evidence he took the money "openly and avowedly." But simply depositing checks in his own account was not the whole story. Dunbar never testified that the Goldmans gave him permission to write checks on his account for a fraction of the amount he had deposited, deposit these checks at Farmers & Merchants Bank in the real Fields Piano account, and then alter the deposit slips so that it looked as though Fields Piano had been fully paid. Not only did Dunbar deprive Fields Piano of over $5 million, he also caused the company to pay taxes on revenue it never received. Dunbar never testified that he had the Goldmans' permission to engage in such commercial insanity.

The defense also requires a "claim of title preferred in good faith." (§ 511.) Dunbar did not testify he believed this money was his. His story was that the Goldmans put money into his account to hold for them and to invest for them. When asked why he had given Jerry Goldman some money from the account, Dunbar replied, "It was in fact his money." Dunbar also testified he would have returned the money to the Goldmans "if they asked for the money back." He repeatedly acknowledged that he should not have been paying his personal expenses – such as car purchases, credit card debt, and gifts to family members – out of the account.

A claim of right defense would undermine this story. As the court pointed out, when denying Dunbar's motion for a new trial on this basis, "Wouldn't counsel be in a bind arguing [Dunbar's] version of events and arguing claim of right? Well, he – well,

folks, he said that he had the money, and it was just there with [the Goldmans'] permission, or was it that he really owned the money, and then therefore he could do with [it] what he wanted? [¶] So I think [defense counsel] would have been in a real bind, even if there were a claim of right defense given." Dunbar's counsel was not ineffective for failing to request this instruction.

Dunbar could not have been prejudiced by the absence of a claim of right jury instruction because CALCRIM No. 1806, theft by embezzlement, as given to this jury, included everything Dunbar now complains was omitted. After explaining that the prosecution had to prove that Dunbar intended to deprive the Goldmans of their money in order to obtain an embezzlement conviction, the instruction provided, in pertinent part, "In deciding whether the defendant believed that he had a right to the property, and whether he held that belief in good faith, consider all the facts known to him at the time he obtained the property, along with all the other evidence in the case. The defendant may hold a belief in good faith even if the belief is mistaken or unreasonable. But, if the defendant was aware of facts that made that belief completely unreasonable, you may conclude that the belief was not held in good faith."

In order to convict Dunbar of embezzlement, the jury must have concluded either that he did not have a good faith belief in his right to the Goldmans' money or that he had a good faith belief, but given the facts known to him at the time, the belief was completely unreasonable. The jury must have considered and rejected the theory Dunbar is advancing now – that he had a defense to embezzlement based on a right to some or all of that money.

II. Prior Conviction

Dunbar testified that he had a 1987 felony conviction for filing false insurance claims.[9] One of Dunbar's two character witnesses testified regarding his honesty and trustworthiness. On cross-examination, the witness was asked whether he was aware of Dunbar's conviction for filing a false insurance claim in 1987. The witness stated he was aware of this conviction, because Dunbar told him about it. Dunbar had also explained to him that he had become confused between two insurance policies. Given that explanation, the witness believed Dunbar was not dishonest. The prosecutor then asked, "Would it surprise you that it was 14 insurance contracts?" The witness replied, "14? Yeah, I guess that would be a surprise at that many." "For the same vehicle?" "Yeah." Further questioning on this topic was then cut off.

Dunbar makes two arguments with respect to this issue. First, he argues the court abused its discretion under Evidence Code section 352 in permitting any reference to his conviction for insurance fraud, owing to its remoteness and to its similarity to the crimes of which he was later accused. Second, he asserts that the prosecutor committed prejudicial misconduct when questioning the character witness regarding the prior conviction.

A. Remoteness and Similarity

We review evidentiary rulings for abuse of discretion and prejudice. (See *People v. Turner* (1994) 8 Cal.4th 137, 200, disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) The trial court carefully considered the arguments regarding the remoteness of Dunbar's conviction for insurance fraud and its similarity to the current charges. It considered the factors articulated in *People v. Castro* (1985) 38 Cal.3d 301, 307 (*Castro*), to be addressed when a court is called upon to decide

[9] Testimony regarding this prior conviction was the subject of two motions in limine. After considering evidence and argument, the trial court decided to admit a "sanitized" version of the conviction – false insurance claims instead of insurance fraud.

whether to admit or exclude evidence of prior convictions under Evidence Code sections 788 and 352, among which are remoteness and similarity to the current charges.

Dunbar's felony insurance fraud conviction was not impermissibly similar to the charges of embezzlement, forgery, and falsifying records. Former Insurance Code section 556 (now Penal Code section 550) made it unlawful to knowingly present false or fraudulent claims for payment of loss, to knowingly present multiple claims for the same loss, or to knowingly prepare a writing to support a false or fraudulent insurance claim. (§ 550, subd. (a)(1), (2), (5).) The criminal actions are preparing and presenting a fraudulent claim. The claim need not be successful.[10] Embezzlement, however, is a form of theft (see *People v. Vidana* (2016) 1 Cal.5th 632, 647-648), and, by definition, it requires "appropriation of property." (§ 503.) The insurance fraud of which Dunbar was convicted required no misappropriation of property.

Although all of these crimes involve moral turpitude – which is why the prior conviction is relevant and admissible at all (see *Castro, supra*, 38 Cal.3d at pp. 313-314) – Dunbar's insurance fraud was a one-time effort to dupe large corporations with whom he had no relationship other than that of a customer. In the present case, by contrast, he occupied a position of trust within a company that employed him, and he worked the same deception over and over for a period of years. (See *People v. Talbot* (1934) 220 Cal. 3, 15 [fiduciary relationship essential element of embezzlement].) In addition, his criminal activity against Fields Piano compromised its accounting system and had severe tax repercussions for the corporation – none of which occurred with the insurance companies. Except for the fact that in both instances he was trying through deceit to get money to which he was not entitled, the two situations are markedly dissimilar.

[10] Indeed, one of Dunbar's efforts to defraud an insurance company was apparently not successful. He was charged with *attempting* to present a fraudulent insurance claim to one insurer in April 1985.

The trial court acknowledged that remoteness was a close call, but ultimately decided the conviction was not impermissibly remote. The court noted that 16 years had elapsed since the 1987 conviction and the first confirmed evidence of embezzlement in 2003, and we consider that as well.[11]

Article 1, section 28(f)(4), of the California Constitution provides in pertinent part, "Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding." As the court explained in *Castro, supra,* the voters added this provision to the constitution through a 1984 initiative intended to counteract a trend limiting the trial courts' ability to exercise discretion to allow testimony regarding prior convictions. (*Castro, supra,* 38 Cal.3d at pp. 307-308.) Nevertheless, the court held, the trial court still had discretion to exclude evidence of prior convictions under Evidence Code section 352. (*Id.* at pp. 312-313.) That is, it could still exclude evidence that was more prejudicial than probative.

The court in this case exercised its discretion – after careful consideration – and decided the insurance fraud conviction was not too remote to be probative of Dunbar's honesty. (See *People v. Castro* (1986) 186 Cal.App.3d 1211, 1217 ["Certainly, if appellant chose to take the stand and disclaim any culpability, he should not be entitled to a 'false aura of veracity.' [Citation.]"].) As for prejudice, the evidence of his guilt was so overwhelming – including his own testimony that he improperly used the Goldmans' money on his personal expenses – that the admission of his conviction for insurance fraud could not have been the tipping point.

Dunbar also argues that allowing the 1987 felony conviction for insurance fraud into evidence was prejudicial because he had led "a legally blameless life" since

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[11] Dunbar argues that his insurance fraud conviction was over 20 years old and therefore qualified as too remote under *People v. Burns* (1987) 189 Cal.App.3d 734. Although more than 20 years had elapsed between the 1987 conviction and the 2010 arrest, part of the reason for the time gap was Dunbar's success in deceiving the Goldmans for at least seven years. That undermines the *Burns* analogy.

that time. While the existence of additional convictions between one felony and another is evidence that the defendant has *not* led a blameless life (see *People v. Mendoza* (2000) 78 Cal.App.4th 918, 925-926), the absence of convictions is not conclusive evidence that he has. Absence of evidence is not evidence of absence. No intervening felony convictions may simply mean a defendant was not caught. Given the covert nature of the crimes of which Dunbar stood accused and the success with which he allegedly concealed them from his victims, the trial court did not abuse its discretion in not affording this circumstance great weight.[12]

"[D]iscretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) We cannot conclude that the court exceeded the bounds of reason under all the circumstances when it decided that the jury should know about Dunbar's prior felony conviction for insurance fraud if he chose to testify in his own defense. We think deleting the word "fraud" was as much as Dunbar could have hoped for.

B. Prosecutorial Misconduct

"Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights . . . but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action '"so infected the trial with unfairness as to make the resulting conviction a denial of due process."' [Citations.]" (*People v. Riggs* (2008) 44 Cal.4th 248, 298.) "'[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion – and on the

[12] The court did in fact consider Dunbar's purportedly crime-free life since his insurance fraud conviction as a factor in favor of excluding the evidence.

same ground – the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]'" (*People v. Stanley* (2006) 39 Cal.4th 913, 952.) Objection or a request for an admonition may be excused if either would have been futile or if an admonition would not have cured the harm. (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

Dunbar's misconduct claim rests on the prosecutor's questions to Dunbar's character witness, to whom Dunbar had given a false explanation of his felony insurance fraud conviction. When the witness stated that Dunbar's explanation of his conviction did not change the witness' opinion about Dunbar's honesty, the prosecutor asked the witness if the fact that 14 insurance contracts were involved, instead of the two contracts to which Dunbar had owned up, would surprise him. The witness said it would. This line of questioning was then discontinued, after a defense objection.

The assumption in the prosecutor's question that Dunbar's 1987 insurance fraud conviction involved 14 separate contracts was incorrect. Dunbar was mainly charged in 1986 with two kinds of Insurance Code violations. One was violating former Insurance Code section 556, subdivision (a)(1), *presenting* a fraudulent insurance claim. The other was violating former Insurance Code section 556, subdivision (a)(3), *preparing* a fraudulent insurance claim. Six insurance companies were involved. As part of a plea bargain, Dunbar pleaded nolo contendere to one count of presenting a fraudulent insurance claim (count 5), one count of preparing a fraudulent insurance claim (count 6), and one count of filing multiple claims for the same loss with more than one insurer between February 21 and April 4, 1985 (count 13). The remaining counts (1 through 4 and 6 through 12) were dismissed in the interests of justice.

Apparently the prosecutor mistakenly believed that each of the 13 counts represented a separate claim made to a different insurance company. In fact, the information alleged that six fraudulent claims to six different companies were (1)

prepared and (2) presented between February 21 and April 4, 1985.[13] The last count, count 13, alleged a violation of a different subdivision, former Insurance Code section 556, subdivision (a)(2), making multiple claims for the same loss.

Dunbar's counsel did not object to the prosecutor's error until two questions later.[14] There was no request for an admonition. The court sustained the objection, and, after a conference in chambers, this line of questioning was abandoned.

Dunbar himself misrepresents the record when he asserts on appeal that he "pleaded no contest to two counts [of] presenting and filing false insurance claims and a third count which accused him of filing multiple claims (because he was admitting the previous two). Thus, it would stand to reason that there were in fact only two victims." In the first place, the two counts to which he pleaded no contest were (1) *preparing* and (2) *presenting* a false insurance claim, not presenting and filing it, which would be the same thing. Second, both counts involved the same insurance company, Transamerican Corporation, and the same day, February 25, 1985. By pleading to these two counts, he was admitting to "filing" (that is, presenting) only one claim, to one insurer. But the third count, filing *multiple* insurance claims for the same loss, spanned the period between February 21 and April 4, 1985, which was, not coincidentally, the period during which Dunbar prepared and presented all six fraudulent claims. It would stand to reason that there were in fact at least six victims. The remaining individual counts, for fraudulent claims to each of the other five insurance companies, were no longer needed because Dunbar pleaded no contest to filing multiple claims for the same loss against all of them, but the plea to the trial court involved *multiple* claims.

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[13] One count was for an attempt to present a fraudulent claim.

[14] "Q Okay. If it were that, that would be dishonest, right? Instead of just a mixup between two contracts and you weren't sure, it's 14. Correct?

"[Defense counsel]: Objection, assumes facts not in evidence."

Although defense counsel eventually objected to the line of questioning – which was immediately cut off – the objection was not based on prosecutorial misconduct, and no corrective admonition was requested. In fact, it appears that no one had read the 1987 charging allegations carefully. If defense counsel knew that six victims were involved – not 14 separate insurance contracts – she kept that knowledge to herself. The court was certainly not aware of it.

Even assuming that Dunbar's claim of misconduct was preserved for appeal, he has not met the requirement that this error was "deceptive and reprehensible" or that it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." In light of the overwhelming evidence of Dunbar's guilt, most of it documentary, the brief exchange between the prosecutor and Dunbar's character witness could not have made the difference between conviction and acquittal.

What came out on cross-examination was that Dunbar had lied to his character witness about the circumstances surrounding his conviction for insurance fraud. It was not a "mixup" between two insurance contracts, as he had explained to his friend, but rather a systematic effort to defraud at least six insurance companies. The difference between fourteen and six here seems nugatory. Dunbar himself opened the door to this line of questioning when his counsel asked the witness whether he knew about Dunbar's felony conviction and whether this knowledge changed his opinion of Dunbar as honest and trustworthy. The witness replied, "Not when he explained the situation, no." "Because the defense opened the door to the subject . . . , the prosecutor properly could raise the issue in cross-examination." (*People v. Friend* (2009) 47 Cal.4th 1, 35.) "[I]f in 'admitting' the prior felony conviction 'the defendant first seeks to mislead a jury or minimize the facts of the earlier conviction' [citation] he may properly be questioned further." (*People v. Shea* (1995) 39 Cal.App.4th 1257, 1267.)[15]

[15] Because we conclude no prosecutorial misconduct occurred, we do not reach Dunbar's argument that his counsel was ineffective for failing to object on this basis.

III. Sentencing

A. The *Bailey* Rule

Dunbar's argument on this topic is that the embezzlement was a continuous act and therefore he should not have been sentenced for each count of grand theft, embezzlement. He should have received one sentence encompassing all the embezzlement counts.

The leading case on this issue is *People v. Bailey* (1961) 55 Cal.2d 514 (*Bailey*), which involved a woman who had received over a year's worth of monthly welfare checks while misrepresenting her marital status. The issue in *Bailey* was whether a series of checks for amounts under the threshold for grand theft could be aggregated to support a grand theft offense. (*Id.* at p. 519.) The California Supreme Court held that it could. (*Ibid.*) The court also held that "[w]hether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan." (*Ibid.*)

"Whether multiple takings are committed pursuant to one intention, one general impulse, and one plan is a question of fact for the jury based on the particular circumstances of each case. [Citations.] As with all factual questions, on appeal we must review the record to determine whether there is substantial evidence to support a finding that the defendant harbored multiple objectives. [Citations.] The *Bailey* doctrine applies as a matter of law only in the absence of any evidence from which the jury could have reasonably inferred that the defendant acted pursuant to more than one intention, one general impulse, or one plan. [Citation.]" (*People v. Jaska* (2011) 194 Cal.App.4th 971, 983-984.)

We look at the record to see whether substantial evidence supports an inference of a single offense or multiple objectives in this case. (*People v. Tabb* (2009) 170 Cal.App.4th 1142, 1149-1150.)

In this case, substantial evidence supports the jury's implied finding that each act of embezzlement arose from a separate intention and impulse. Dunbar did not divert every Fields Piano check he deposited. Instead, he carefully chose which ones he was going to take, probably based on the ease with which he could alter the deposit receipts to cover up his deceit. He thus formed a separate intention and acted according to a separate impulse each time he put checks in his own account, wrote a much smaller check for the Fields Piano account, and faked the deposit receipt. These were separate acts of deception carried out over several years. Dunbar had to decide each time he went to the bank whether or not he was going to take Fields Piano's money. There was ample evidence from which the jury could have reasonably inferred that Dunbar acted pursuant to a new plan each time. The fact each of these thefts was part of the same desire to enrich himself at the expense of his employer cannot be determinative, or there would be no *Bailey* rule.

The defendant in *People v. Caldwell* (1942) 55 Cal.App.2d 238 (*Caldwell*) made a similar, and similarly unavailing, argument regarding his grand theft conviction. The defendant represented to a corporation seeking insurance that he could obtain a policy from Lloyd's of London. Through several deceptions he managed to persuade corporate representatives that he had this authority and that insurance had been obtained from Lloyd's. In fact, he did not have this authority, and there was no insurance. (*Id.* at pp. 242-244.) He simply pocketed five insurance premiums as they were paid. (*Id.* at p. 244.) When sentenced separately for each fraudulently obtained insurance payment, he argued that he should have been sentenced for only one count of grand theft, because all of the payments were "prompted by one impulse arising from the representations" made at the beginning of his fraud. (*Id.* at p. 250.)

The court held that the acceptance of each premium payment impliedly repeated his misrepresentation about his authority to obtain insurance and "[t]he receipt and appropriation of the moneys to his own use on the five several dates constituted five separate acts, each a complete crime in itself." (*Caldwell, supra*¸55 Cal.App.2d at p. 251; see *People v. Barber* (1959) 166 Cal.App.2d 735, 741-742 [separate stock sales based on one representation constitute separate thefts].)

Dunbar argues that his conviction on the enhancements for white-collar crime (§ 186.11, subd. (a)(1)) and taking property in the commission of a felony (§ 12022.6, subd. (a)(4)) militate in favor of his one-sentence argument. If the jury could add up all his embezzlements to find the enhancements true, then they must have been part of a single plan.

Dunbar overlooks the difference between the statutory language of sections 186.11 and 12022.6 and the *Bailey* rule. Section 186.11 imposes an enhancement for a "pattern of related felony conduct," defined as two or more felonies "that have the same or similar purpose, result, principals, victims, or methods of commission, or are otherwise related by distinguishing characteristics, and that are not isolated events." The *Bailey* rule, however, does not focus on a pattern of conduct but rather on the "impulse" or "intent" behind the pattern of conduct. Likewise, the purpose of section 12022.6 is to deter large-scale crime. (*People v. Ramirez* (1980) 109 Cal.App.3d 529, 539; *People v. Hughes* (1980) 112 Cal.App.3d 452, 459.) To that end, the penalties get heavier as the value of stolen property increases. Section 12022.6, subdivision (b), permits the aggregation of multiple felony losses so long as they arise from a "common scheme or plan." Once again, the focus of the statute is on the plan, not on the impulse or the intent behind the plan that was the focus in *Bailey*.

B. Section 654

Dunbar also argues that section 654 prohibits sentencing him multiple times for embezzlement. Section 654 prohibits punishing "[a]n act or omission that is

punishable in different ways by different provisions of law" "under more than one provision." Dunbar's embezzlement counts were punishable in the same way by the same provision of law, section 503. He was sentenced under only that provision. This argument is meritless.

IV. Amount of Restitution Fine

Dunbar argues the trial court abused its discretion by imposing the maximum fine allowed by section 1202.4 – $10,000 – without inquiring about his ability to pay it.[16] The defendant in such cases has the burden of presenting evidence regarding his or her *inability* to pay (§ 1202.4, subd, (d)), and no such evidence is included in the record. Dunbar's counsel offered no documents or testimony regarding Dunbar's financial condition.

Dunbar also contends that the court did not consider the "relevant factors" set out in the code section. At the sentencing hearing, Dunbar's counsel objected to the fine "without a finding that Mr. Dunbar has the ability to pay." The court replied, "I don't think it requires ability to pay. . . ." Dunbar bases his argument that the court did not consider the relevant factors on this exchange.

While section 1202.4, subdivision (d) requires a court to consider "any relevant factors," including inability to pay, when setting the amount of the fine, it

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[16] Section 1202.4, subdivision (b)(1), provides: "(b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense. If the person is convicted of a felony, the fine shall not be less than three hundred dollars ($300) and not more than ten thousand dollars ($10,000). If the person is convicted of a misdemeanor, the fine shall not be less than one hundred fifty dollars ($150) and not more than one thousand dollars ($1,000)."

Section 1202.4, subdivision (d), provides: "In setting the amount of the fine pursuant to subdivision (b) in excess of the minimum fine pursuant to paragraph (1) of subdivision (b), the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime. Consideration of a defendant's inability to pay may include his or her future earning capacity. *A defendant shall bear the burden of demonstrating his or her inability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required.* A separate hearing for the fine shall not be required." (Italics added.)

absolves the court from having to make express findings as to the factors. In addition, contrary to counsel's characterization of the "relevant factor," the court did not have to establish that Dunbar had the ability to pay. Instead, Dunbar bore the burden of demonstrating his *inability* to pay. (See § 1202.4, subd. (d).) He presented no evidence whatsoever on this subject. Without any such evidence, Dunbar's inability to pay the fine never became a "relevant factor" for the court to consider.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.